SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 635

ROBERT VINCENT GARDNER,
Appellant,

v.

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,
Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellees' contention in the motion papers that the appellant did not offer any explanation for his refusal to sign the waiver of immunity is not correct in that his reasons therefor were before the hearing officer; appellant did urge denial of equal protection of the laws in the state court.

Appellant submits this brief in opposition to the motion to dismiss or affirm to point out to this Court that the contention of the appellees on pp. 5 and 11 of the motion which

states that the appellant failed to give reasons for his refusal to sign the waiver of immunity is incorrect. The Grand Jury minutes were in evidence at the hearing, and the contents thereof were before the Hearing Officer. When asked to sign the waiver of immunity, the appellant stated at the Grand Jury hearing, "A. Until now? On the advice of my attorney I have been regarded as a target of this investigation and you have no authority to question me" (pp. 33-34).* At the departmental hearing Assistant District Attorney Andreoli repeated in substance this reason (p. 45) and the minutes were offered into evidence. Appellant's counsel at the hearing, in moving to dismiss the charge, reasserted the good and compelling reason for the refusal to sign the waiver—that appellant was at the time of the subpoena a target of the investigation and that his presence in the Grand Jury room was illegal and all consequences flowing therefrom were illegal (pp. 49-50). This reason is based on the fact that the appellant at the time of his appearances before the Grand Jury was suspended and under departmental charges (pp. 68, 37) which charges encompassed the same announced area of inquiry of the Grand Jury investigation (pp. 68, 19, 32, 44-45); that he was a potential defendant (p. 47); that it was not the intention of the Grand Jury to offer immunity (p. 16); and that at the time of his Grand Jury appearance appellant was "* * * fighting for my job in the Police Department at the trial room" (p. 28). From these facts appellant concluded that he was not a witness in truth and fact at the Grand Jury hearing, but was a target of the investigation. Counsel at the hearing moved to dismiss the charge on the ground that the power of the Grand Jury to subpoena was limited to witnesses who are in truth and fact witnesses, and not

* All page references are to the Certified Record unless otherwise indicated.

to targets of the investigation, citing *People* v. *Steuding*, 6 NY2d 214 (pp. 49-50). This contention was urged throughout the state court proceedings. The *Steuding* case and *Matter of Bernoff* v. *Amoroso*, 188 Misc. 845, aff'd 271 AD 925, were cited and urged by appellant in the state court proceedings. Confirmation of this can be found in the official report of this case—*Matter of Gardner* v. *Broderick*, 20 NY2d 227, under "Points of Counsel" wherein those cases are cited along with *Schawecker* v. *Green*, 96 App. Div. 249, 254 (1st Dep't 1904). *Schawecker* v. *Green* holds that a Civil Service employee under charges need not testify at his own removal hearing since his superior officer has changed roles to that of his judge. Appropriate are the words of *Matter of Bernoff* v. *Amoroso*, at 188 Misc. 845, 847,

> "* * * Attendance of persons before a grand jury is governed exclusively by §609 of the Code of Criminal Procedure which authorizes the District Attorney to issue subpoenas for 'witnesses' to 'appear before the grand jury, upon an investigation pending before them.' This is the only provision of law which empowers the district attorney to compel the appearance of a person before the grand jury. * * * Section 609 specifically limits persons for whom subpoenas may be issued to 'witnesses'. The generic term 'persons' is not used. This is clear recognition of the distinction which exists between persons who are the objects of grand jury inquiry and 'witnesses'. Accordingly the grant of power to subpoena persons to appear before a grand jury is limited to 'witnesses.' * * *"

The requirement of signing a waiver of immunity is unconstitutional under the circumstances involving threatened forfeiture of position and hence falls of its own weight as

a requirement of public office. In addition thereto, appellant offered compelling and cogent reasons for the inappropriateness of signing the waiver of immunity which caused a shift of burden of proving misconduct and permitted consequences to flow from illegal Grand Jury procedures which were a deprivation of equal protection of the laws. These reasons were urged in the state courts.

Conclusion

The motion to dismiss or affirm should be denied and jurisdiction noted.

January 12, 1968

Respectfully submitted,

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